

**FILED**

AUG 28 2015

CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY: *mp* DEPUTY

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SAN DIEGO UNIFIED PORT  
DISTRICT,

Plaintiff,

vs.

UNDERWRITERS AT LLOYD'S,  
LONDON AND OTHER LONDON  
MARKET INSURERS; NORTH  
PACIFIC INSURANCE COMPANY,  
LTD.,

Defendants.

NORTH PACIFIC INSURANCE  
COMPANY,

Counterclaimant,

vs.

SAN DIEGO UNIFIED PORT  
DISTRICT,

Counter-Defendant.

CASE NO. 15-cv-00022-WQH-  
JLB

ORDER

HAYES, Judge:

The matter before the Court is the motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) or, in the alternative, motion for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e) ("motion to dismiss the Counterclaim for Reimbursement") (ECF No. 25) filed by Plaintiff and Counter-Defendant San Diego Unified Port District.

**I. Background**

On January 6, 2015, Plaintiff San Diego Unified Port District commenced this action by filing the Complaint in this Court against Defendants Underwriters at Lloyd's

1 London and Other London Market Insurers (“Lloyd’s”) and North Pacific Insurance  
 2 Company, Ltd. (ECF No. 1). On March 5, 2015, North Pacific Insurance Company  
 3 (“North Pacific”) appeared in this action, filing a motion for a more definite statement.<sup>1</sup>  
 4 (ECF No. 6). On March 26, 2015, Plaintiff filed the First Amended Complaint  
 5 (“FAC”), which is the operative complaint in this case. (ECF No. 12). On March 27,  
 6 2015, the Court issued an Order, denying North Pacific’s motion for a more definite  
 7 statement as moot. (ECF No. 14). On May 28, 2015, Defendant Lloyd’s filed an  
 8 answer. (ECF No. 21). On May 28, 2015, Defendant North Pacific filed an answer and  
 9 Counterclaim for Reimbursement against Plaintiff. (ECF No. 20).

10 On June 22, 2015, Plaintiff filed the motion to dismiss the Counterclaim for  
 11 Reimbursement, accompanied by a declaration and two exhibits. (ECF No. 25). On  
 12 July 13, 2015, Defendant North Pacific filed an opposition (ECF No. 29), accompanied  
 13 by a request for judicial notice (ECF No. 30). On July 20, 2015, Plaintiff filed a reply,  
 14 accompanied by a request for judicial notice. (ECF No. 33).

## 15 **II. Allegations of the FAC**

16 The FAC alleges that North Pacific entered into insurance policies, Policy Nos.  
 17 85CB1004 (9-1-85 to 9-1-87), with non-party Campbell Industries, Inc. (“Campbell”),  
 18 which agreed to “defend the Port against property damage liability claims arising out  
 19 of an occurrence...” (ECF No. 12 at 4). In 2004, the California Regional Water  
 20 Quality Control Board (“the Regional Board”) issued Investigative Order No. R9-2004-  
 21 0027, requiring Plaintiff to “prepare and submit a technical report to the Regional  
 22 Board regarding contaminated marine sediment in the San Diego Bay” at the National  
 23 Steel & Shipbuilding Company Shipyard Sediment Site (“the Site”). *Id.* at 5. In 2009,  
 24 the City of San Diego filed a lawsuit against Plaintiff and other parties in the Southern  
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26 <sup>1</sup> According to North Pacific, North Pacific and North Pacific Insurance Company, Ltd.  
 27 are distinct and unrelated entities. (ECF No. 20 at 18). North Pacific is a company organized  
 28 under the laws of Oregon, and North Pacific Insurance Company, Ltd. is a company organized  
 under the laws of Bermuda. *Id.* North Pacific appears in this action as “Defendant North  
 Pacific Insurance Company ... sued erroneously as North Pacific Insurance Company, Ltd....”  
*Id.* at 2.

1 District, and other parties filed cross-claims against Plaintiff (“the Shipyard Suit”). In  
2 2012, the Regional Board ordered Plaintiff to take “corrective actions necessary to  
3 remediate the contaminated marine bay sediment” at the Site. *Id.*

4 Plaintiff “timely tendered the Shipyard Suit to North Pacific, along with written  
5 requests that North Pacific defend and indemnify the Port pursuant to the provisions  
6 of the North Pacific Policies.” *Id.* at 6. In April 2012, Defendant North Pacific agreed  
7 to defend Plaintiff in the Shipyard Suit, subject to a reservation of rights. “North  
8 Pacific has failed to fully defend the Port in the Shipyard Suit pursuant to the Port’s  
9 North Pacific Policies.” *Id.*

10 The FAC asserts eight claims for relief, and three claims against Defendant  
11 North Pacific: (1) declaratory relief; (2) breach of contract; and (3) bad faith and the  
12 breach of the implied covenant of good faith and fair dealing. Plaintiff requests a  
13 declaration that the North Pacific policies obligate Defendant North Pacific “to fully  
14 defend and reimburse the Port and to pay in full on the Port’s behalf all defense fees,  
15 costs and expenses related to the Shipyard Suit.” *Id.* at 16. Plaintiff requests  
16 compensatory, consequential, exemplary, and punitive damages, attorneys’ fees, costs,  
17 interest, and future costs from Defendant North Pacific.

### 18 **III. Allegations of the Counterclaim for Reimbursement**

19 Defendant North Pacific is an insurance company incorporated under Oregon  
20 law. North Pacific Insurance Company, Ltd. is a Bermuda corporation. Defendant  
21 North Pacific was unaware of North Pacific Insurance Company, Ltd.’s existence until  
22 April 2015. North Pacific Insurance Company, Ltd. insured Campbell from 1985 until  
23 1987, “under Policy Nos. 85CB1004 and 86CB1004.” (ECF No. 20 at 18). When  
24 Plaintiff tendered defense in the Shipyard Suit, Plaintiff tendered the defense to  
25 Defendant North Pacific instead of North Pacific Insurance Company, Ltd.

26 “North Pacific accepted tender of the Shipyard Suit, in a situation where North  
27 Pacific reasonably believed the actual policy or policies of insurance to be lost, subject  
28 to and expressly conditioned on North Pacific’s full reservation of rights to deny

1 coverage.” *Id.* at 18. Defendant North Pacific has been defending Plaintiff since 2012  
 2 and paying 6.6% share of Plaintiff’s invoices, for a total of \$129,525.96. “On April 22,  
 3 2015, shortly after North Pacific learned it owed no obligations to the Port, North  
 4 Pacific demanded repayment of this \$129,525.96 sum.” *Id.* at 19.

5 The Counterclaim for Reimbursement asserts one claim for relief: reimbursement  
 6 of Defense Fees and Costs against the Port. Under the heading “First Cause of Action”  
 7 for “Reimbursement of Defense Fees and Costs against the Port,” the Counterclaim  
 8 alleges, “North Pacific is entitled to recovery of the \$129,525.96 on the theories of  
 9 restitution, unjust enrichment, quasi-contract, and/or reimbursement under *Buss v.*  
 10 *Superior Court*, 16 Cal. 4th 35 (1997).” *Id.* at 20. The Counterclaim requests  
 11 judgment in Defendant North Pacific’s favor, reimbursement, costs, and attorneys’ fees.

#### 12 **IV. Motion to Dismiss**

##### 13 **A. Rule 12(b)(6) Standard**

14 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state  
 15 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Federal Rule of  
 16 Civil Procedure 8(a) provides that “[a] pleading that states a claim for relief must  
 17 contain ... a short and plain statement of the claim showing that the pleader is entitled  
 18 to relief.” Fed. R. Civ. P. 8(a)(2). “A district court’s dismissal for failure to state a  
 19 claim under Federal Rule of Civil Procedure 12(b)(6) is proper if there is a ‘lack of a  
 20 cognizable legal theory or the absence of sufficient facts alleged under a cognizable  
 21 legal theory.’” *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011)  
 22 (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990)).

23 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
 24 requires more than labels and conclusions, and a formulaic recitation of the elements  
 25 of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
 26 (quoting Fed. R. Civ. P. 8(a)). “To survive a motion to dismiss, a complaint must  
 27 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
 28 plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,



1 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
2 content that allows the court to draw the reasonable inference that the defendant is  
3 liable for the misconduct alleged.” *Id.* (citation omitted). “[T]he tenet that a court must  
4 accept as true all of the allegations contained in a complaint is inapplicable to legal  
5 conclusions. Threadbare recitals of the elements of a cause of action, supported by  
6 mere conclusory statements, do not suffice.” *Id.* (citation omitted). “When there are  
7 well-pleaded factual allegations, a court should assume their veracity and then  
8 determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 679. “In  
9 sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content,  
10 and reasonable inferences from that content, must be plausibly suggestive of a claim  
11 entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.  
12 2009) (quotations and citation omitted).

### 13 **B. Contentions of the Parties**

14 Plaintiff moves to dismiss Defendant North Pacific’s Counterclaim on the  
15 ground that Defendant North Pacific was required to submit a written claim to Plaintiff  
16 pursuant to California’s Tort Claims Act (“CTCA”), California Government Code §§  
17 900, *et seq.*, prior to filing the Counterclaim for Reimbursement because Plaintiff is a  
18 public agency. Plaintiff asserts that Defendant did not comply with the written claim  
19 requirement. Plaintiff contends that the Counterclaim contains no allegations  
20 demonstrating that Defendant North Pacific complied with the written claim  
21 requirement, or that Defendant North Pacific should be excused from complying.  
22 Plaintiff submits an April 22, 2015 letter from Defendant North Pacific’s counsel to  
23 Plaintiff’s counsel and contends that the April 22, 2015 letter does not satisfy the  
24 CTCA’s written claim requirement.

25 Defendant North Pacific contends that two exceptions to the written claim  
26 requirement apply to this case. First, Defendant North Pacific contends that it is not  
27 required to submit a written claim pursuant to the CTCA because Plaintiff is not listed  
28 on the California Secretary of State’s Roster of Public Agencies. Defendant North

1 Pacific requests judicial notice of a “California Secretary of State Certificate of No  
2 Record re: the San Diego Unified Port District.” (ECF No. 30 at 2). Second,  
3 Defendant North Pacific contends that the written claim requirement “does not apply  
4 to a defendant’s counterclaims against a government-entity plaintiff that relate[s] to the  
5 same set of facts that are alleged in the government-plaintiff’s complaint.” (ECF No.  
6 29 at 10).

7 With respect to the first exception, Plaintiff contends that Defendant North  
8 Pacific is still required to submit a written claim because Plaintiff satisfied its  
9 obligation to file a statement with the Secretary of State to be placed on the Roster of  
10 Public Agencies. Plaintiff asserts that the failure to list Plaintiff on the Roster of Public  
11 Agencies is the Secretary of State’s fault, not Plaintiff’s fault. Plaintiff requests  
12 judicial notice of filings it submitted to the Secretary of State to be listed on the Roster  
13 of Public Agencies.

14 With respect to the second exception, Plaintiff contends that the second  
15 exception raised by Defendant North Pacific only applies to a “cross-action against a  
16 cross-defendant and raises the issue of relative liability among the public entity and the  
17 defendant in a third-party lawsuit.” (ECF No. 33 at 5). Plaintiff contends that  
18 Defendant North Pacific’s Counterclaim and Plaintiff’s FAC “arise out of very  
19 different factual and legal circumstances.” *Id.* at 4.

### 20 **C. Requests for Judicial Notice**

21 Federal Rule of Evidence 201 provides that “[t]he court may judicially notice a  
22 fact that is not subject to reasonable dispute because it ... is generally known within the  
23 trial court’s territorial jurisdiction; or ... can be accurately and readily determined from  
24 sources whose accuracy cannot reasonably be questioned.” Fed R. Evid. 210(b).  
25 “[U]nder Fed. R. Evid. 201, a court may take judicial notice of ‘matters of public  
26 record.’” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (quoting *Mack*  
27 *v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir.1986)).

28 Defendant North Pacific requests judicial notice of a “California Secretary of

1 State Certificate of No Record re: the San Diego Unified Port District.” (ECF No. 30).  
 2 Plaintiff does not object. The Court takes judicial notice of the “California Secretary  
 3 of State Certificate of No Record re: the San Diego Unified Port District” as a matter  
 4 of public record.

5 Plaintiff requests judicial notice of four exhibits, all filings submitted to the  
 6 California Secretary of State with respect to the “Roster of Public Agencies.” (ECF  
 7 No. 33-1 at 2). All exhibits are file-stamped by the California Secretary of State. The  
 8 Court takes judicial notice of the four exhibits appearing at ECF No. 33-3 as a matter  
 9 of public record.

#### 10 **D. Analysis**

11 California Government Code section 945.4 provides:

12 Except as provided in Sections 946.4 and 946.6, no suit for money or  
 13 damages may be brought against a public entity on a cause of action for  
 14 which a claim is required to be presented in accordance with Chapter 1  
 15 (commencing with Section 900) and Chapter 2 (commencing with Section  
 16 910) of Part 3 of this division until a written claim therefor has been  
 presented to the public entity and has been acted upon by the board, or has  
 been deemed to have been rejected by the board, in accordance with  
 Chapters 1 and 2 of Part 3 of this division.

17 Cal. Gov. Code § 945.4. Section 946.4 provides two exceptions to this requirement:

18 (a) Where provision is made by or pursuant to law that no suit may be  
 19 brought against a public agency as defined in Section 53050 unless and  
 20 until a claim is presented to the agency, the failure to present a claim does  
 not constitute a bar or defense to the maintenance of a suit against such  
 public agency if, during the 70 days immediately following the accrual of  
 the cause of action:

21 (1) No statement pertaining to the public agency is on file, or is placed on  
 22 file, in the Roster of Public Agencies in the office of the Secretary of State  
 and of the county clerk of each county in which the public agency then  
 maintains an office, as required by Section 53051; or

23 (2) A statement or amended statement pertaining to the public agency is  
 24 on file, or is placed on file, in the Roster of Public Agencies in the office  
 25 of the Secretary of State and of the county clerk of each county in which  
 the public agency then maintains an office, but the information contained  
 26 therein is so inaccurate or incomplete that it does not substantially  
 conform to the requirements of Section 53051.

27 (b) On any question of fact arising within the scope of paragraphs (1) and  
 28 (2) of subdivision (a), the burden of proof is upon the public agency.

*Id.* § 946.4(a), (b). Section 53051(c) provides that “[i]t shall be the duty of the

1 Secretary of State and of the county clerk of each county to establish and maintain an  
 2 indexed 'Roster of Public Agencies,' to be so designated, which shall contain all  
 3 information as required in subdivisions (a) and (b), which roster is hereby declared to  
 4 be a public record." *Id.* § 53051(c).

5 Plaintiff has submitted a judicially noticeable document from the Secretary of  
 6 State, dated July 8, 2015, titled "CERTIFICATE OF NO RECORD," and stating that  
 7 the Secretary of State has "failed to find any records of a filing in this office and in  
 8 accordance with California Government Code section 53051" for Plaintiff. (ECF No.  
 9 30-1 at 2). The fact that Plaintiff submitted four documents to the Secretary of State  
 10 pertaining to the Roster of Public Agencies between April 2013 and January 2015 does  
 11 not establish that these filings were "on file, or placed on file, in the Roster of Public  
 12 Agencies" during the 70 days immediately following the accrual of Defendant North  
 13 Pacific's claim. Cal. Gov. Code § 946.4(a). The Court concludes that Plaintiff has the  
 14 "burden of proof" as the "public agency" and has failed to establish that a "statement  
 15 pertaining to [Plaintiff] is on file, or is placed on file, in the Roster of Public Agencies"  
 16 during the 70 days immediately following the accrual of Defendant North Pacific's  
 17 claim. *Id.* §§ 946.4(a), (b).

18 "[I]t is manifestly unjust to allow a State to bring a suit upon a contract and then  
 19 to use what amounts to a notice statute to shield itself from a cross-complaint asserted  
 20 by the defendant in the same suit and arising from that very contract. *People ex rel.*  
 21 *Dep't of Parks and Recreation v. West-A-Rama, Inc.*, 35 Cal. App. 3d 786, 794 (1973).  
 22 Both the Complaint and the Counterclaim seek a determination of rights and liabilities  
 23 pursuant to Policy No. 85CB1004. *See* ECF No. 12 at 4-5 ("North Pacific insured  
 24 Campbell pursuant to one or more written policies of insurance in effect for all of or  
 25 portions of the period from September 1, 1985 to September 1, 1987 under Policy Nos.  
 26 85CB1004 (9-1-85 to 9-1-87)..."); ECF No. 20 at 18 ("Bermuda North Pacific insured  
 27 Campbell Industries and certain of its affiliates ... from October 16, 1985 to September  
 28 1, 1987 under Policy Nos. 85CB1004 and 86CB1004."). Plaintiff seeks a declaration



1 that it is entitled to defense pursuant to this policy, while Defendant North Pacific  
2 seeks a judgment that Defendant has no obligations to Plaintiff pursuant to this policy  
3 and that it is entitled to reimbursement for defense costs paid under this policy. The  
4 Court concludes that Plaintiff is not entitled to “shield itself from a [counterclaim]  
5 asserted by the defendant in the same suit and arising from” the same contract upon  
6 which Plaintiff commenced this action. *West-A-Rama, Inc.*, 35 Cal. App. 3d at 794.

7 Plaintiff’s motion to dismiss pursuant to Rule 12(b)(6) is denied.

#### 8 **V. Motion for a More Definite Statement**

9 Plaintiff moves for a more definite statement pursuant to Rule 12(e) on the  
10 ground that Plaintiff is unable to ascertain Defendant North Pacific’s legal theories.  
11 Plaintiff contends that Defendant North Pacific’s reimbursement claim is vague  
12 because one of the supporting allegations for that claim states that Defendant North  
13 Pacific is entitled to recovery under restitution, unjust enrichment, quasi-contract, and  
14 reimbursement theories.

15 Defendant North Pacific contends that the Counterclaim for Reimbursement sets  
16 forth all key facts. Defendant North Pacific contends that Plaintiff only objects to one  
17 paragraph as vague, paragraph 115. Defendant North Pacific contends that there is  
18 nothing improper about paragraph 115.

19 Federal Rule of Civil Procedure 12(e) provides that a party may move for a more  
20 definite statement for a pleading that is “so vague or ambiguous that the party cannot  
21 reasonably prepare a response.” Fed. R. Civ. P. 12(e). A Rule 12(e) motion “must  
22 point out the defects complained of and the details desired.” *Id.*

23 The Counterclaim for Reimbursement contains factual allegations and a single  
24 claim for reimbursement. Paragraph 115 states that “North Pacific is entitled to  
25 recovery of the \$129,525.96 on the theories of restitution, unjust enrichment, quasi-  
26 contract, and/or reimbursement under *Buss v. Superior Court*, 16 Cal. 4th 35 (1997).”  
27 (ECF No. 20 at 20).

28 *Buss* held that an insurer may seek “reimbursement” from the insured when it

1 assumes defense for claims that are “not even potentially covered.” *Buss*, 16 Cal. 4th  
2 at 50. *Buss* explained:

3 The insurer therefore has a right of *reimbursement* that is implied in law  
4 as *quasi-contractual*, whether or not it has one that is implied in fact in  
5 the policy as contractual. As stated, under the law of *restitution* such a  
right runs against the person who benefits from “*unjust enrichment*” and  
in favor of the person who suffers loss thereby.

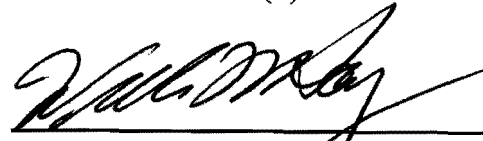
6 *Id.* at 51 (emphases added). The Court concludes that the Counterclaim for  
7 Reimbursement is not “so vague” that Plaintiff “cannot reasonably prepare a response.”  
8 Fed. R. Civ. P. 12(e).

9 The Court concludes that a more definite statement is not warranted. Plaintiff’s  
10 motion for a more definite statement is denied.

11 **VI. Conclusion**

12 IT IS HEREBY ORDERED that Plaintiff’s motion to dismiss pursuant to Federal  
13 Rule of Civil Procedure 12(b)(6) or, in the alternative, motion for a more definite  
14 statement pursuant to Federal Rule of Civil Procedure 12(e) is DENIED.

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16  
17 DATED: 8/28/15



18 WILLIAM Q. HAYES  
19 United States District Judge  
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